

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2005-23-C - ORDER NO. 2005-
AUGUST 1, 2005

IN RE: Application of ATX Licensing, Inc. for a	) ORDER
Certificate of Public Convenience and	) GRANTING
Necessity to Provide Resold Intrastate	) CERTIFICATE FOR
Interexchange Telecommunications Services	) INTEREXCHANGE
within the State of South Carolina and for	) AUTHORITY AND
Alternative Regulation.	) MODIFIED
	) ALTERNATIVE
	) REGULATION-
	) PROPOSED BY
	) HEARING EXAMINER

This matter comes before the Public Service Commission of South Carolina (the “Commission”) by way of the Application of ATX Licensing, Inc. (“ATX” or the “Company”) requesting a Certificate of Public Convenience and Necessity authorizing it to operate as a reseller of interexchange telecommunications services within the State of South Carolina. The Company’s Application was filed pursuant to S.C. Code Ann. §58-9-280 (Supp. 2004) and the general regulatory authority of the Commission. By its Application, ATX also requests alternative regulation of its business services offerings identical to that granted to AT&T Communications in Order Nos. 95-1734 and 96-55 in Docket No. 95-661-C, as modified by Commission Order No. 2001-997 in Docket No. 2000-407-C, and further requests waiver of certain Commission regulations.

The Commission's Docketing Department instructed ATX to publish, one time, a Notice of Filing in newspapers of general circulation in the areas of the state affected by the Application. The purpose of the Notice of Filing was to inform interested parties of the Application of ATX and of the manner and time in which to file the appropriate pleadings for participation in the proceeding. ATX complied with this instruction and provided the Commission with proof of publication of the Notice of Filing. No Petitions to Intervene or Protests were filed.

This Commission appointed Mr. David Butler as hearing examiner in this case in Order No. 2005-145, pursuant to the authority granted in S.C. Code Ann. Section 58-9-1020 (1976). Subsequent to the hearing in this matter, and pursuant to 26 S.C. Code Ann. Regs. 103-865, Mr. Butler submitted a proposed order to the parties in this matter, and gave those parties ten days after receipt of that Order to file exceptions to the Order, briefs, or a request for oral argument before this Commission. No exceptions, briefs, or requests for oral argument were received. Accordingly, we will decide the matter based on the record of the case and the proposed Order as submitted by the hearing examiner.

A hearing was convened on May 17, 2005, at 10:00 a.m. in the Commission's Hearing Room, Columbia, South Carolina before hearing examiner Butler. ATX was represented by John J. Pringle, Jr., Esquire. Wendy B. Cartledge, Esquire, represented the Office of Regulatory Staff.

Alexander Kuhner appeared and testified in support of the Application. Kuhner adopted the testimony of Bruce Bennett, Vice President for External Affairs of the Company. The record reveals that ATX is incorporated in the State of Delaware and

registered to transact business in South Carolina as a foreign corporation. The Company is headquartered in the State of Pennsylvania. According to Mr. Kuhner, ATX proposes to operate as a reseller of intrastate interexchange telecommunications services to the public on a statewide basis and to offer a wide range of “1+” direct dialed interexchange telecommunications services on a resale basis.

Specifically, ATX seeks authority to provide MTS, WATS services, toll-free service, and calling cards. ATX does not intend to offer any pre-paid cards. Mr. Kuhner explained the Company’s request for authority, and the record reveals the Company’s services, operations, and marketing procedures.

With regard to marketing procedures, Mr. Kuhner states that ATX does not intend to market in South Carolina, but instead will provide service primarily to customers of other states who have satellite offices located in South Carolina. ATX will obtain Letters of Authorization (LOAs) from all new customers.

Mr. Kuhner also discussed ATX’s technical, financial, and managerial resources to provide the services for which it seeks authority to provide. Mr. Kuhner offered that ATX possesses sufficient financial resources to support its operations in South Carolina. The Company recently emerged from Chapter 11 bankruptcy, and, at this time, has no debt left. With regard to management and technical capabilities, Mr. Kuhner testified that ATX is currently licensed to provide telecommunications services in a number of states. The Company has not been denied a license in any of the states in which it has applied, has had no licenses revoked in any jurisdictions, nor has it been the subject of any investigations by any governmental regulatory agencies. Both the Company’s

Application and Mr. Kuhner's testimony evidence that the members of the management team of ATX have extensive experience in marketing and communications. Mr. Kuhner also testified that ATX will operate in accordance with Commission rules, regulations, guidelines, and Commission Orders.

Mr. Kuhner offered that approval of ATX's Application would serve the public interest by increasing the level of long distance competition in South Carolina, by providing a high-quality alternative of long distance service, and by increasing consumer awareness of options and services available, thus encouraging the growth and success of competitive services.

Further, Mr. Kuhner testified that ATX is currently providing resold interexchange services in South Carolina. ATX provides incidental services to branch offices of approximately fifty-six (56) business customers whose principal service location is in another state in which ATX is authorized to provide interexchange service and has been actively marketing services. Mr. Kuhner noted that ATX recently discovered that it was providing intrastate long distance services without proper Commission authorization while conducting due diligence related to its impending emergence from bankruptcy. ATX apparently did not have in place until recently a compliance plan that would provide guidelines as to where its Sales and Provisioning personnel could sell service. As a result, the Sales and Provisioning personnel agreed to provide service to branch locations of existing customers whose principal location was in a state where ATX was authorized to provide service. Kuhner stated that while the vast majority of the services provided to the branch locations were interstate or unregulated in

nature, ATX recently determined that it was also providing intrastate long distance services in states where it was not authorized to do so. Upon learning of this issue, ATX has pursued obtaining the proper authorizations. ATX characterizes the intrastate long distance service provided as a “relatively small amount,” although Kuhner stated that services had been provided to 56 customers in South Carolina. It should be stated that ATX’s testimony revealed that the Company’s total customer base throughout the United States is 300,000.

ATX states that in order to prevent future situations where ATX sells services that it is not authorized to provide, ATX has developed and circulated guidelines for its Sales Managers and Provisioning team that indicate the states in which ATX is authorized to provide local and/or intrastate long distance services. In addition, ATX provides this information on its intranet website and is in the process of incorporating it in the training materials used for Sales and Provisioning personnel. ATX requests, because of its voluntary disclosure, that this Commission grant its application on a *nunc pro tunc* basis.

After full consideration of the applicable law, the Company’s Application, and the evidence presented at the hearing, the Commission hereby issues its findings of fact and conclusions of law:

FINDINGS OF FACT

1. ATX is organized as a corporation under the laws of the State of Delaware and is authorized to do business as a foreign corporation in the State of South Carolina by the Secretary of State.

2. ATX is currently licensed to operate as a telecommunications reseller in a number of states, has a substantial customer base, and has no reported record of violations of regulatory laws or regulations in the jurisdictions in which it is currently operating.

3. ATX desires to operate as a reseller of interexchange telecommunications services in South Carolina.

4. We find that ATX possesses the managerial experience and capability to operate as a non-facilities based reseller of interexchange services in South Carolina.

5. We further find, based on the recent financial records and balance sheets submitted by the Company, that ATX possesses sufficient financial resources to provide the services as described in its Application.

6. We find that the issuance of a Certificate of Public Convenience and Necessity to ATX to operate as a reseller of interexchange telecommunications services in South Carolina would be in the best interest of the citizens of South Carolina by increasing the level of long distance competition in South Carolina, by providing an alternative of long distance service, and by increasing consumer awareness of options and services available, thereby encouraging growth and success of competitive services. Further, we believe that the application should be granted *nunc pro tunc*, in recognition of ATX's voluntary full disclosure with regard to its prior provision of intrastate service. It appears that services were provided to a small percentage of customers in the Company's entire customer base.

7. The post-hearing recommendation that this Commission should order refunds, and for other administrative relief, should not be adopted.

CONCLUSIONS OF LAW

1. Based on the above findings of fact, the Commission concludes that a Certificate of Public Convenience and Necessity should be granted to ATX *nunc pro tunc* to provide intrastate interLATA service and to originate and terminate toll traffic within the same LATA, as set forth herein, through the resale of intrastate Wide Area Telecommunications Services (WATS), Message Telecommunications Service (MTS), Foreign Exchange Service, Private Line Service, or any other services authorized for resale by tariffs of carriers approved by the Commission. The *nunc pro tunc* designation is granted as the result of ATX's full disclosure with regard to its prior provision of intrastate service in South Carolina.

2. The Commission adopts a rate design for ATX for its resale of residential services which includes only maximum rate levels for each tariff charge. A rate structure incorporating maximum rate levels with the flexibility for adjustment below the maximum rate levels has been previously adopted by the Commission. In Re: Application of GTE Sprint Communications Corporation, etc., Order No. 84-622, issued in Docket No. 84-10-C (August 2, 1984).

3. ATX shall not adjust its residential rates below the approved maximum level without notice to the Commission and to the public. ATX shall file its proposed rate changes, publish its notice of such changes, and file affidavits of publication with the Commission two weeks prior to the effective date of the changes. However, the public

notice requirement is waived, and therefore not required, for reductions below the maximum cap in instances which do not affect the general body of subscribers or do not constitute a general rate reduction. In Re: Application of GTE Sprint Communications, etc., Order No. 93-638, issued in Docket No. 84-10-C (July 16, 1993). Any proposed increase in the maximum rate level for residential services reflected in the tariff which would be applicable to the general body of the Company's subscribers shall constitute a general ratemaking proceeding and will be treated in accordance with the notice and hearing provisions of S.C. Code Ann. §58-9-540 (Supp. 2004).

4. With respect to ATX's business services, consumer card, and operator service offerings, the Commission adopts a relaxed regulatory scheme identical to that granted to AT&T Communications in Order Nos. 95-1734 and 96-55 in Docket No. 95-661-C. Under this relaxed regulatory scheme, tariff filings for business services shall be presumed valid upon filing. The Commission will have seven (7) days in which to institute an investigation of any tariff filing. If the Commission institutes an investigation of a particular tariff filing within the seven days, the tariff filing will then be suspended until further Order of the Commission. Any relaxation in the future reporting requirements that may be adopted for AT&T shall apply to ATX also. These alternative regulation orders were modified by Order No. 2001-997 in Docket No. 2000-407-C which imposed a cap on operator-assisted calls where a consumer uses a local exchange carrier's calling card to complete calls from locations which have not selected the local exchange carrier as their toll provider.

Pursuant to Order No. 2001-997, this Commission modified the alternative regulation by the re-imposition of rate caps with regard to certain operator assisted calls where a customer uses a local exchange carrier's calling card to complete calls from locations which have not selected that local exchange carrier as the toll provider. Order No. 2001-997, dated November 8, 2001, imposed a maximum cap of \$1.75 for operator surcharges for such calls, and a maximum cap of \$0.35 related to the flat per-minute rate associated with these calls. The re-imposition of rate caps for certain operator assisted calls has led to alternative regulation now being known as "modified alternative regulation." The provisions of Order No. 2001-997 and the modification contained therein also apply to ATX.

5. If it has not already done so by the date of issuance of this Order, ATX shall file its revised tariff and an accompanying price list within thirty (30) days of receipt of this Order. The revised tariff shall be consistent with the findings of this Order and shall be consistent with the Commission's Rules and Regulations.

6. ATX is subject to access charges pursuant to Commission Order No. 86-584, in which the Commission determined that for access purposes resellers and facilities-based interexchange carriers should be treated similarly.

7. With regard to the Company's resale of service, an end-user should be able to access another interexchange carrier or operator service provider if the end-user so desires.

8. ATX shall resell the services of only those interexchange carriers or LECs authorized to do business in South Carolina by this Commission. If ATX changes underlying carriers, it shall notify the Commission in writing.

9. With regard to the origination and termination of toll calls within the same LATA, ATX shall comply with the terms of Order No. 93-462, Order Approving Stipulation and Agreement, in Docket Nos. 92-182-C, 92-183-C, and 92-200-C (June 3, 1993), with the exception of the 10-XXX intraLATA dialing requirement, which has been rendered obsolete by the toll dialing parity rules established by the FCC pursuant to the Telecommunications Act of 1996 (See, 47 CFR 51.209). Specifically, ATX shall comply with the imputation standard as adopted by Order No. 93-462 and more fully described in paragraph 4 of the Stipulation and Appendix B approved by Order No. 93-462.

10. ATX shall file annual financial information in the form of annual reports and gross receipts reports as required by the Commission. The annual report and the gross receipt report will necessitate the filing of intrastate information. Therefore, ATX shall keep financial records on an intrastate basis for South Carolina to comply with the annual report and gross receipts filings. The proper form for filing annual financial information can be found at the Commission's website at www.psc.sc.gov/reference/forms.asp. The title of this form is "Annual Report for Interexchange Companies." This form shall be utilized by the Company to file annual financial information with the Commission and the Office of Regulatory Staff and shall be filed no later than **April 1st**. Commission gross receipts forms are due to be filed with

the Commission and the Office of Regulatory Staff no later than **October 1st** of each year. The proper form for filing gross receipts information can be found at the Commission's website at www.psc.sc.gov/reference/forms.asp, and the appropriate form is entitled "Gross Receipts for Utility Companies."

11. The Company shall, in compliance with Commission regulations, designate and maintain an authorized utility representative who is prepared to discuss, on a regulatory level, customer relations (complaint) matters, engineering operations, tests and repairs. In addition, the Company shall provide to the Commission and the Office of Regulatory Staff in writing the name of the authorized representative to be contacted in connection with general management duties as well as emergencies which occur during non-office hours. ATX shall file the names, addresses and telephone numbers of these representatives with the Commission and the Office of Regulatory Staff within thirty (30) days of receipt of this Order. The "Authorized Utility Representative Information" form can be found at the Commission's website at www.psc.sc.gov/reference/forms.asp; this form shall be utilized for the provision of this information to the Commission. Further, the Company shall promptly notify the Commission in writing if the representatives are replaced.

12. The Company is directed to comply with all Rules and Regulations of the Commission, unless a regulation is specifically waived by the Commission.

13. At the hearing, ATX requested a waiver of 26 Code Regs. 103-610 (1976), which requires that records required by the Commission's Rules and Regulations be maintained in South Carolina. The record reveals that ATX's principal headquarters will

be located in Pennsylvania, and ATX requests permission to maintain its books and records at its headquarters in that state. The Commission finds ATX's requested waiver reasonable and understands the difficulty presented to ATX should the waiver not be granted. The Commission therefore grants the requested waiver that ATX be allowed to maintain its books and records at its principal headquarters. However, ATX shall make available its books and records at all reasonable times upon request by the Commission or the Office of Regulatory Staff and ATX shall promptly notify both if the location of its books and records changes.

14. ATX also requests that it be exempt from record keeping policies that require a carrier to maintain its financial records in conformance with the Uniform System of Accounts (USOA). The USOA was developed by the FCC as a means of regulating telecommunications companies subject to rate base regulation. As a competitive carrier, ATX maintains its book of accounts in accordance with Generally Accepted Accounting Principles (GAAP). GAAP is used extensively by interexchange carriers. Moreover, ATX asserts that because it utilizes GAAP, the Commission will have a reliable means by which to evaluate ATX's operations and assess its financial fitness. Accordingly, ATX hereby requests an exemption from the USOA requirements. We grant the Company's request for the reasons stated above.

15. Each telecommunications company certified in South Carolina is required to file annually the Intrastate Universal Service Fund (USF) worksheet. This worksheet provides the Commission and the Office of Regulatory Staff information required to determine each telecommunications company's liability to the State USF fund. The

Intrastate USF worksheet is due to be filed with both the Commission and the Office of Regulatory Staff annually no later than August 15th.

16. Post-hearing, the Office of Regulatory Staff filed a recommendation that the Company be required to refund intrastate revenues collected prior to the Company's receipt of certification or alternately, that the Company be required to refund the difference between the revenues collected and the amount paid to ATX's underlying carrier. The ORS stated that "prior Commission Orders have required one of these options associated with the unauthorized collection of revenues." In addition, under the ORS recommendation, if adopted, the Company would be required to notify the Commission and ORS after the refunds are made and provide supporting documents to assist ORS with the verification of the accuracy and of the amount of refund on a per customer basis. We decline to adopt the recommendation.

We would note that this Commission has held in past Orders that it has the discretionary authority to order refunds in appropriate circumstances for service provided by a telephone utility prior to its obtaining a Certificate of Public Convenience and Necessity. Under prior Orders, we have examined the particular circumstances of each case, and have both ordered refunds and waived refunds. See e.g. Application of Executone Information Systems, Inc., Docket No. 92-052-C, Order No. 92-637, dated August 7, 1992; Application of Buyers United International, Inc., Docket No. 98-375-C, Order No. 1999-2, dated January 4, 1999. In the Executone case, we found that the circumstances surrounding Executone's provision of telephone service on an intrastate basis prior to obtaining authority was an appropriate instance in which to require refunds,

in that Executone was aware of the statutory prohibition against providing telephone service without authority, and the Company willingly chose to provide telephone service and charge for that service prior to and during the pendency of its Application. One of this Commission's concerns in the Executone case was the question of potential harm to the state's telephone subscribers who could have unwittingly subscribed to an uncertified carrier. Order No. 92-637 at 2. On the other hand, because of a small customer base and the small amount of revenue collected from completed intrastate calls, we waived refunds in the Buyers United International, Inc. case. Order No. 1999-127 at 7.

Again, however, the ultimate outcome on a request for refunds is discretionary with this Commission based on the circumstances of the case. In the present case, we decline to adopt the ORS recommendation.

First, we would note that the Company explicated the fact that it had provided intrastate service in South Carolina in both its Application and in the prefiled testimony of the Company's witness. However, no party pursued the question in discovery, nor did any party pursue the matter in great detail at the hearing. In fact, the amount of South Carolina intrastate revenues earned by the Company was not known until receipt of a late-filed exhibit requested by the Hearing Examiner. Because the amount of intrastate revenue was not known until after the proceeding, the parties could not effectively litigate the question in the context of the record of the case, present arguments pro or con, or answer questions related to the amounts subsequently stated in the late-filed exhibit. Again, even the ORS recommendation did not come until after the hearing in this matter was over. Taken in this posture, it is the opinion of this Commission that ordering refunds

is unfair to the Company, especially since the Company appears to have taken every action that it could to become certificated after it discovered that it was providing service without authority.

Further, we do not see harm to the state's telephone subscribers in taking this position. Again, the Company's testimony was that although ATX is currently providing resold interexchange services in South Carolina, it provides such service to branch offices of approximately fifty-six (56) business customers whose principal service location is in another state in which ATX is authorized to provide interexchange service. Testimony of Bennett as adopted by Kuhner at 5-6. In other words, the Company provided service to customers already under contract in other states. It does not appear from the testimony that ATX actively sought new customers in South Carolina. Further, ATX does not intend to market in South Carolina if it is granted authority, according to the witness. Again, the Company intends to provide service primarily to customers of other states who have satellite offices located in South Carolina. Id. at 7. We would also note that the number of customers being served in South Carolina already (56) is small compared to the Company's overall number of customers (300,000). Testimony of Kuhner in the hearing.

In addition, there are no "slamming" complaints shown in the record against the Company. ATX further states that, if certificated, it will prevent unauthorized switching of customers initially by obtaining a signed letter of authorization (LOA) or similar authorization from all new customers. Testimony of Bennett as adopted by Kuhner at 7.

The Commission declines to order the recommended refunds, since we believe that it would be unfair to do so in the present posture of the case.

17. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Randy Mitchell, Chairman

ATTEST:

G. O'Neal Hamilton, Vice Chairman

(SEAL)